STATE OF MICHIGAN

COURT OF APPEALS

TIMM SMITH and MARIA C. HOWARD-SMITH, Plaintiffs-Appellants/Cross-Appellees, v TOWNSHIP OF HOLLY, Defendant-Appellee/Cross-Appellant.	UNPUBLISHED August 13, 2013 No. 306406 Oakland Circuit Court LC No. 2010-113821-CZ

TIMM SMITH and MARIA C. HOWARD-SMITH, Plaintiffs-Appellees, v TOWNSHIP OF HOLLY, Defendant-Appellant.	 No. 306758 Oakland Circuit Court LC No. 2010-113821-CZ

Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

In this property action, plaintiffs Timm Smith and Maria C. Howard-Smith brought an action seeking to quiet title to certain property located in the Township of Holly. In Docket No. 306406, plaintiffs appeal as of right the trial court's grant of summary disposition on the basis of laches in favor of defendant Township of Holly. Defendant filed a cross-appeal in Docket No. 306406 and also a direct appeal in Docket No. 306758, challenging the trial court's denial of its request for post-judgment relief in which defendant sought entry of an order quieting title to the property at issue in favor of defendant. We affirm the trial court's grant of summary disposition in favor of defendant on plaintiff's action to quiet title but remand for the trial court to enter an order quieting title of the central 10 acres to defendant and directing the parties to take any

necessary action to correspondingly divide the 20-acre parcel, and also to consider plaintiffs' claims involving the two five-acre portions of land that still belong to plaintiffs.

I. BACKGROUND

This matter involves certain property located at 1031 South Holly Road, Fenton, MI 48430. The property has a complicated chain of title and possession. Plaintiffs first gained a property interest in this land in 1989, when they entered into a land contract for the purchase of just under 20 acres of vacant land at this location. Over the next 15 years plaintiffs engaged in a series of property transfers among family members. The transfers involved a central ten-acre portion of the parcel and two five-acre sections. However, neither plaintiffs nor their family members ever actually split the property, so despite the numerous property transfers, the near 20 acres remained undivided and retained one tax identification number. Eventually, all of the land that had been transferred to family members was returned to plaintiffs, such that they again owned the entire 20-acre parcel.

On December 7, 2004, plaintiffs took out a mortgage on the central 10 acres of property, on which sat their house, in the amount of $137,600. The mortgage did not apply to the two five-acre portions of property. The mortgagee was Mortgage Electronic Registration Systems, Inc. (MERS), and the lender was Republic Bank. Plaintiffs began to have difficulty paying their mortgage and, eventually, MERS foreclosed by advertisement on plaintiffs' 10 acres of property and a sheriff's sale was held on May 27, 2008. MERS was the highest bidder at the sheriff's sale in the amount of $138,502.78. The recording included information that the "[t]he redemption period shall be 12 months from the date of sale[,]" namely, May 27, 2009.

On June 3, 2008, MERS quit claimed the 10-acre property to Federal National Mortgage Association (FNMA). On May 21, 2009, FNMA quit claimed the 10-acre property to PHH Mortgage Corporation (PHH). PHH sought possession of the 10-acre property from plaintiffs and on July 9, 2009 obtained a consent judgment against plaintiffs in the district court. The district court judgment stated that an order of eviction would be issued against plaintiffs if they did not vacate the property by August 10, 2009. Thereafter, plaintiffs voluntarily left the property within 30 days. On November 19, 2009, PHH gifted, via quit claim deed, the 10-acre property to defendant. Plaintiffs moved their family back into the house located on the subject 10 acres in late November 2010 by entering through an unlocked window.

Plaintiffs filed their complaint to quiet title to the subject 10 acres on October 4, 2010. Defendant filed its motion for summary disposition on July 19, 2011, arguing that laches precluded plaintiffs from quieting title because they waited 29 months after the foreclosure sale to bring their action. Defendant requested that the trial court grant its motion for summary disposition and enter an order quieting title in its favor. Plaintiffs filed their motion for partial summary disposition based on *Residential Funding Co, LLC v Saurman*, 292 Mich App 321; 807

NW2d 412 (2011), which held that MERS does not qualify to foreclose by advertisement and must instead seek to foreclose by judicial process.[1]

On September 14, 2011, after the trial court entertained oral argument on the parties' cross-motions for summary disposition, the trial court held that the doctrine of laches barred plaintiffs' complaint. Thereafter the trial court issued two orders, one order denying plaintiffs' partial motion for summary disposition, and one order granting defendant's motion for summary disposition and dismissing plaintiffs' complaint with prejudice. Despite the grant of summary disposition in defendant's favor, neither order quieted title in favor of defendant or even mentioned the subject 10 acres. Defendant then sought post-judgment relief of entry of an order quieting title to the subject property in favor of defendant. The trial court denied the relief.

While this case was pending, defendant filed its own action to quiet title against plaintiffs to the 10 acres at issue, but that case was later dismissed voluntarily.

In Docket No. 306406, plaintiffs appeal as of right the trial court's grant of summary disposition in favor of defendant. Defendant cross-appeals in Docket No. 306406 and also appeals in Docket No. 306758, challenging the trial court's denial of its request for post-judgment relief, in which it sought entry of an order quieting title to the subject property in favor of defendant.

II. GRANT OF SUMMARY DISPOSITION TO DEFENDANT

Plaintiffs argue on appeal that the trial court erred when it granted summary disposition in favor of defendant and dismissed their complaint in its entirety. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010). A motion pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*. This Court also reviews de novo a trial court's decision to apply equitable doctrines such as laches. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

Under MCL 600.3240, after a sheriff's sale is completed, any lawfully entitled person under the mortgage may redeem the property by paying the requisite amount within the applicable prescribed time limit, which in this case was 12 months. MCL 600.3240(1) and (12). If the mortgagor does not redeem the property within the requisite period, the purchaser of the sheriff's deed is vested with "all the right, title, and interest" in the property. MCL 600.3236;

[1] Thereafter, our Supreme Court reversed this Court's decision in *Residential Funding Co, LLC v Saurman*, 490 Mich 909; 805 NW2d 183 (2011), and held that MERS is authorized to foreclose by advertisement under MCL 600.3204(1)(d).

see *Piotrowski v State Land Office Bd*, 302 Mich 179, 187; 4 NW2d 514 (1942). In other words, when plaintiffs do not avail themselves of the right of redemption in the foreclosure proceedings before the expiration of such right, all of the plaintiffs' rights in and to the property are extinguished. *Piotrowski*, 302 Mich at 187.

Laches is an equitable affirmative defense "based primarily on circumstances that render it inequitable to grant relief to a dilatory plaintiff." *AG v Powerpick Players' Club of Mich, LLC*, 287 Mich App 13, 51; 783 NW2d 515 (2010). It is caused by a plaintiff's failure to do something that should have been done under the circumstances or failure to claim or enforce a right at the proper time. *Id*. The mere passage of time does not constitute laches; rather, laches applies when there has been an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to the party asserting laches. *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996); *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 252; 704 NW2d 117 (2005).

Here, it is undisputed that plaintiffs failed to redeem the subject 10 acres within the 12-month redemption period and the property was foreclosed upon and a sheriff's sale occurred. The sheriff's sale occurred on May 27, 2008, and PHH quit claimed the subject 10 acres to defendant on November 19, 2009. Plaintiffs did not file their complaint seeking to quiet title to the property until October 4, 2010, over 16 months past the May 27, 2009, redemption deadline, and nearly a year after defendant took title to the property. But, as stated above, the mere passage of time does not constitute laches. While the trial court did not state how defendant's position had materially changed due to the passage of time, the record demonstrates that defendant spent significant time, effort, and resources to assess, maintain, and secure the subject property. In particular, defendant regularly visited the property, had a survey performed, removed debris and cleaned up the property, investigated the structural integrity of the buildings on the property and labeled certain buildings as unsafe, investigated water damage and a dangerous mold concern in the house, declared the residential structure not habitable and secured the house, and erected fence posts with no trespassing signs on the property. It is evident that defendant spent time and money investigating the problems on the property and either began correcting those problems or securing the property so that the public would be protected from certain dangerous conditions present on the property. Also, defendant had been limited in what it could do to improve the property since plaintiffs moved their family back into the house on the property and were physically occupying the property.

Our review of the record reveals that plaintiffs sat on this cause of action for an inordinate amount of time — 29 months since the sheriff's sale, 17 months since the expiration of the redemption period, and nearly 12 months since defendant took title to the subject 10 acres. Plaintiffs also failed to take affirmative steps to resolve the issue in the district court proceeding when PHH sought possession of the 10-acre property from plaintiffs, instead opting to enter into a consent judgment and voluntarily leave the property. Over the last year, during plaintiffs' unexcused and unexplained delay, defendant spent significant time and resources on the property, resulting in defendant's prejudice. For these reasons, the trial court properly granted summary disposition in favor of defendant under the laches doctrine. *Dep't of Pub Health*, 452 Mich at 507; *Wayne Co Retirement Comm*, 267 Mich App at 252.

Plaintiffs also raise the argument that defendant has acted with unclean hands and for that reason it may not assert the equitable doctrine of laches. Indeed, our Supreme Court has explained that a complainant in equity must come to the court with a clean conscience, in good faith, and after acting with reasonable diligence. "'Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing.'" *Henderson v Connolly's Estate*, 294 Mich 1, 19; 292 NW 543 (1940), quoting *Campau v Chene*, 1 Mich 400, 405 (1850). However, plaintiffs raise these charges for the first time on appeal, and a review of the record simply does not support plaintiffs' allegations. The record contains no evidence that defendant acted without a clean conscience, in bad faith, or with unreasonable delay.

Plaintiffs next argue that the trial court erred when it refused to consider and properly adjudicate the remainder of plaintiffs' claims contained in their complaint after it granted summary disposition in favor of defendant based on laches. We agree, because certain of plaintiffs' claims involve alleged trespass and other violations of plaintiffs' rights with regard to the property that was not foreclosed upon. Plaintiffs may have been dilatory in arguing that they retain title to the central 10 acres, but claims that involve the remaining land and that arose subsequent to the foreclosure are not barred by laches. We therefore direct the trial court on remand to consider plaintiffs' claims to the extent that they involve the two five-acre parcels not claimed by defendant.

III. DENIAL OF ORDER QUIETING TITLE

Defendant argues that that the trial court erred when it denied its request for post-judgment relief, in which defendant sought entry of an order quieting title to the subject property in its favor. Plaintiffs respond that the trial court properly declined to quiet title in favor of defendant because defendant never properly pleaded its claim. This Court reviews de novo a trial court's ultimate decision in an action to quiet title, but reviews the court's factual findings underlying its decision for clear error. *Wanzer Jonkers v Summit Twp*, 278 Mich App 263, 265; 747 NW2d 901 (2008).

Six months after plaintiffs filed their complaint to institute this action, defendant filed a counter-complaint on April 1, 2011, including two counts against plaintiffs, a count seeking to quiet title to the 10-acre subject property, and trespass. Among other remedies, defendant requested the trial court declare that the subject 10-acre portion of the property be defendant's in fee simple and that the title to the property be forever quieted by judgment. After plaintiffs objected to the filing of the counter-complaint, defendant withdrew its counter-complaint on April 21, 2011. Defendant filed its motion for summary disposition on July 19, 2011, requesting that the trial court grant its motion for summary disposition and enter an order quieting title to the subject 10 acres in its favor. The trial court heard argument on the parties' cross-motions for summary disposition on September 14, 2011. At the close of her argument, defendant's attorney asked the trial court to "grant summary disposition in favor of Holly Township and enter an order of quieting title in their favor." Indeed, when the trial court ruled on the motion, the trial court granted defendant's motion for summary disposition, and then stated, "The Court quiets title in favor of Holly Township." Defense counsel then asked if she should present an order to the court and the trial court stated that it would enter the order. The trial court actually issued two orders, one denying plaintiffs' motion for summary disposition, and one granting

defendant's motion for summary disposition and dismissing plaintiffs' complaint with prejudice. However, neither order included language quieting title to the subject property in favor of defendant.

Defendant then filed with the trial court a notice of entry of order under the seven day rule, MCR 2.602(B)(3). Defendant's proposed order was titled, "Order Quieting Title," and stated that due to the trial court's grant of summary disposition in favor of defendant in the matter, "Defendant, Township of Holly's Title is superior to that of the entire world and any and all claims disputing Defendant's Title in the subject property . . . by Plaintiffs, Timm Smith and Maria C. Howard-Smith, or anyone claiming by or through the Plaintiffs, are hereby barred."

Plaintiffs filed objections to defendant's proposed order asserting that the proposed order was faulty because the trial court's previous order was a final order dismissing the matter with prejudice and defendant had not submitted objections to that order. Defendant filed a motion in response to plaintiffs' objections to defendant's proposed order asserting that pursuant to MCR 2.602 and MCR 2.612, the trial court could grant the post-judgment relief requested by defendant. After entertaining oral argument on the matter, the trial court declined to amend its written order, held that there was no basis in the pleadings for it to grant defendant relief since defendant had dismissed its counter-complaint, and also stated that the trial court's previous statement quieting title in defendant's favor at the summary disposition hearing was in error.

This Court has held that, "[a] trial court does not have the authority to grant relief based on a claim that was never pleaded in a complaint or requested at any time before or during trial." *Reid v Michigan*, 239 Mich App 621, 630; 609 NW2d 215 (2000). However, here it is undisputed that defendant did request that the trial court quiet title in the subject property in its favor in its motion for summary disposition. Thus, plaintiffs were on notice and reasonably informed of the nature of the relief defendant requested months before the parties argued their cross-motions for summary disposition before the trial court. Because the request for quiet title was pleaded, the trial court had authority to grant relief. *Id*.

Additionally, the trial court has the discretion to allow a party to amend the pleadings to conform to the evidence, even after trial pursuant to MCR 2.118(C)(1). MCR 2.118(C)(1), which states:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.

In the instant case, the trial court had the discretion to allow defendant to amend its pleadings even after judgment. The litigation of this matter was lengthy and intense, and both parties were clearly aware that each wished to have the trial court quiet title to the central 10 acres in their favor and impliedly consented to that fact. In fact, the title to the subject property was the question at the very heart of the litigation. The issue was so well-woven into the fiber of the litigation that even the trial court stated in its summary disposition ruling from the bench that it was quieting title in favor of defendant.

We conclude that the trial court erred when it did not recognize after properly granting summary disposition in defendant's favor that it could have quieted title in favor of defendant if it found such action otherwise warranted. This decision is further buttressed by the fact that this issue is one of law and it has the potential to arise again between the same parties regarding the same property in the future. Therefore, because all of the necessary facts have been presented, in the interest of judicial efficiency we address and resolve this issue on the current well-litigated, well-documented record. See *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237-238; 713 NW2d 269 (2005).

The application of laches to bar plaintiffs' claim does not necessarily mean that defendant is entitled to an order quieting title in its favor, because laches merely bars relief in favor of plaintiffs. "Laches can scarcely create title where none existed." *Ziegler v Simmons*, 353 Mich 432, 440; 91 NW2d 819 (1958). There must be an independent reason to quiet title in favor of defendant. However, the doctrine of res judicata does, in fact, require judgment in favor of defendant.

Res judicata applies if the previous action was decided on the merits, the matter contested in the present action was or could have been resolved in the previous action, and both actions involve the same parties or their privies. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). The first requirement is met because the district court action to foreclose on the 10 acres at issue was decided by a consent judgment that held that PHH was entitled to take ownership of the 10 acres. *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991) ("Res judicata applies to default judgments and consent judgments as well as to judgments derived from contested trials."). The second requirement is satisfied, because the consent judgment determined the ownership of the 10 acres, which is exactly the issue disputed here.

Finally, both plaintiffs were parties to the prior actions, and defendant is a privy of PHH. Parties are in privity if there is a "substantial identity of interests" and the interests of the party in the second action were adequately presented and protected by the first litigant. *Adair v State*, 470 Mich 105, 122; 680 NW2d 386 (2004). Defendant acquired PHH's interest in the subject 10 acres, so there is a substantial identity of interest between the two entities and defendant's interests were adequately advanced by PHH in the prior action.

Therefore, res judicata applies to the issue of the ownership of the central 10 acres, and defendant is entitled to an order quieting title to the 10 acres in its favor. On remand, the trial court shall also direct the parties to take whatever steps are necessary to properly divide the 20-acre parcel.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro